UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAYBOY ENTERPRISES INTERNATIONAL, INC., Plaintiff and Counterclaim Defendant, -against- MEDIATAKEOUT.COM LLC, Defendant and Counterclaim Plaintiff.	Civil Action No. 15-07053 (PAE) **DEFENDANT'S ANSWER AND COUNTERCLAIMS** **JURY TRIAL DEMANDED**

Defendant Mediatakeout.com LLC ("Mediatakeout"), through its counsel Daniel Law PLLC, for its answer to the complaint of plaintiff Playboy Enterprises International, Inc. ("Playboy"), alleges as follows:

SUBSTANCE OF THE ACTION

1. The first sentence of this allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation. Defendant admits the assertion in the second sentence that plaintiff seeks damages at trial.

PARTIES

2. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

3. Defendant denies the allegation that it is a corporation, avers that it is a limited liability company duly organized under the laws of New York, and admits the allegation as to its principal place of business.

JURISDICTION AND VENUE

4. To the extent this allegation asserts conclusions of law, no response is required. Defendant admits plaintiff purports to bring this action under the Copyright Act.

5. Defendant admits it conducts business in this District and denies the remainder of the allegations in this paragraph.

6. This allegation asserts conclusions of law and no response is required.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

7. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

8. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

9. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegation in the first sentence of this paragraph and accordingly denies it. Defendant admits plaintiff attached an image as Exhibit A but lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

10. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

11. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

12. Defendant denies the allegations in this paragraph and avers that the Certificate of Registration attached as Exhibit B shows that plaintiff falsely claimed to be author and claimant of the copyright as a work for hire, which plaintiff subsequently contradicted it its purported attached application for supplementary registration dated August 17, 2015, which asserts that Ellen Von Unwerth, a German national, is author and claimant of the copyright in the work. Upon information and belief, plaintiff's application for supplementary registration has not been approved by the Copyright Office.

13. Defendant denies the allegations in this paragraph and avers that the Certificate of Registration attached as Exhibit C shows that plaintiff falsely claimed to be author and claimant of the copyright as a work for hire, which plaintiff subsequently contradicted it its purported attached application for supplementary registration dated August 17, 2015, which asserts that Ellen Von Unwerth, a German national, is author and claimant of the copyright in the work. Upon information and belief, plaintiff's application for supplementary registration has not been approved by the Copyright Office.

14. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

15. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

16. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of this allegation and accordingly denies it.

17. Defendant denies the allegations in this paragraph except as to plaintiff's use of capitalized and abbreviated phrases which refer to previous allegations.

18. Defendant admits that it places its URL address on certain images on its website, avers that portions of this paragraph assert conclusions of law, denies the allegations as to copyright management information, and denies the allegations as to Exhibit D, which purports to be Certificate or Registration VAu 1-197-477 listing Plaintiff as author of the work as a work for hire. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations concerning Exhibit D and accordingly denies them.

19. Defendant denies the allegations in this paragraph.

FIRST CLAIM FOR RELIEF
DIRECT COPYRIGHT INFRINGEMENT
(17 U.S.C. § 101 *et seq.*)

20. Defendant realleges and incorporates by reference its responses to paragraphs 1-19 above.

21. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

22. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

23. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

24. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

25. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

26. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

27. Defendant denies the allegations in this paragraph.

28. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE DIGITAL MILLENNIUM COPYRIGHT ACT
(17 U.S.C. § 1202)

29. Defendant realleges and incorporates by reference its responses to paragraphs 1-28 above.

30. Defendant denies the allegations in this paragraph.

31. Defendant denies the allegations in this paragraph.

32. Defendant denies the allegations in this paragraph.

33. To the extent this allegation asserts conclusions of law, no response is required, and Defendant otherwise denies the allegations in this paragraph.

34. Defendant denies the allegations in this paragraph.

35. To the extent this allegation asserts conclusions of law, no response is required, and Defendant otherwise denies the allegations in this paragraph.

36. To the extent this allegation asserts conclusions of law, no response is required, and Defendant otherwise denies the allegations in this paragraph.

37. This allegation asserts conclusions of law which require no answer, but Defendant otherwise denies this allegation.

Further, Defendant denies each and every material allegation not heretofore controverted and demands strict proof thereof.

With respect to plaintiff's Wherefore clause and demand for judgment in its paragraphs 1through 10, Defendant denies that plaintiff is entitled to any such relief.

INTRODUCTION TO AFFIRMATIVE DEFENSES

To the extent that it is plaintiff's burden to prove any of the issues raised in the affirmative defenses below, Defendant hereby reserves and does not waive its legal position that plaintiff maintains the burden of proof on those issues.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to set forth any claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred and plaintiff lacks standing because it has failed to obtain valid and truthful Certificates of Registration for the works allegedly infringed.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrines of laches, waiver, acquiescence, estoppel, and/or unclean hands.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of copyright misuse.

FIFTH AFFIRMATIVE DEFENSE

Defendant's copyright infringements, if any, were innocent.

SIXTHTH AFFIRMATIVE DEFENSE

Plaintiff has suffered no damage as a result of the acts alleged in the complaint and plaintiff is not entitled to any relief at equity or law.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to an injunction it has an adequate remedy at law.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claim for injunctive relief is moot.

NINTH AFFIRMATIVE DEFENSE

Defendant's unauthorized uses, if any, are protected by the doctrine of fair use, as set forth in the Copyright Act, 17 U.S.C. § 107.

TENTH AFFIRMATIVE DEFENSE

Defendant's alleged unlawful acts were authorized by license, express or implied.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant's violations of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1202, if any, were innocent and not made with the intent require by that law.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claim for injunctive relief as to alleged violations of the DMCA are moot and such relief would impose a prior restraint on free speech or the press under the First Amendment and in violation of the DMCA, 17 U.S.C. § 1203(b)(1).

THIRTEENTH AFFIRMATIVE DEFENSE

Any award of damages under the DMCA should be remitted under 17 U.S.C. § 1203(c)(5) because Defendant's violation of the DMCA, if any, and Defendant "was not aware and had no reason to believe that its acts constituted a violation."

COUNTERCLAIMS

1. Defendant and Counterclaim Plaintiff Mediatakeout asserts counterclaims against Playboy for (1) breach of contract allowing Mediatakeout to use images from Playboy for the purpose of public commentary by Mediatakeout and its readers and the promotion of Playboy's magazine and products, as long as Mediatakeout gave Playboy credit and (2) for unfair competition under the common law of New York by singling out Mediatakeout as the target of this infringement action while ignoring scores of other internet-based companies disseminating Playboy's images and promoting its products in similar fashion.

JURISDICTION

2. This court has supplemental jurisdiction over these claims under 28 U.S.C. § 1367(a), because the common law claims and the federal claims derive from a common nucleus of operative facts and form part of the same case or controversy.

VENUE

3. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2) and (3).

PARTIES

4. Mediatakeout.com LLC is a limited liability company duly organized and existing under the laws of the State of New York with its principal place of business in the City, County, and State of New York.

5. Upon information and belief, Plaintiff and Counterclaim Defendant Playboy is a Delaware corporation which is authorized to and is doing business in the City, County, and State of New York.

RELEVANT FACTS

6. Mediatakeout is the leading internet-based news source for urban celebrity news. It operates a website and publishes news and commentary on its website, www.mediatakeout.com, which has more than 16 million readers a month. It regularly features articles and photographic images of popular and controversial celebrities involved in music, fashion, sports, and other areas of wide-spread public interest.

7. In October 2014, Mediatakeout was contacted by email by Bertrand Klein ("Klein") on behalf of Playboy regarding Mediatakeout's use of Playboy images of Masika Kalysha and complained that Mediatakeout was not giving Playboy credit when those images were used by Mediatakeout. Upon information and belief, Klein was an employee or agent of Playboy authorized to act on its behalf.

8. Mediatakeout informed Klein that it did in fact give Playboy credit on its website and also informed Mediatakeout's readers that any such images were from Playboy and included a link to Playboy's website.

9. Klein stated that he was satisfied with Mediatakeout's procedures for use of Playboy images, thanked Mediatakeout for including Playboy content on its website, asked it to consider other Playboy products, and offered to provide Mediatakeout with high resolution Playboy images for future use.

10. Mediatakeout complied with Klein's requests.

11. After those communications with Klein, Mediatakeout did not receive any further complaints regarding its use of Playboy images or content.

12. Apart from Mediatakeout's agreement with Playboy through Klein, Playboy has given its implied consent to the uses of its images and content by third parties on the internet, including Mediatakeout, through its conduct in widely promoting the celebrities featured in its magazines and on the internet, and encouraging third parties, including Mediatakeout, to do likewise, as long as credit is given to Playboy, all of which amounts to widespread free advertising for Playboy.

13. To the best of Mediatakeout's knowledge, Playboy has not sought to enforce its claimed rights with respect to images of Azealia Banks against any other persons or entities.

14. In addition, the actions of Mediatakeout and other internet-based entities in publicizing and commenting on Playboy's announcements, articles, and images of celebrity entertainer Azealia Banks are protected by the First Amendment of the Constitution.

FIRST COUNTERCLAIM
(Breach of Contract)

15. Mediatakeout realleges and incorporates by reference the allegations in paragraphs 1 through 10 above.

16. On September 8, 2015, Playboy commenced this civil action against Mediatakeout alleging that it had infringed Playboy's claimed copyright in specified photographs of celebrity entertainer Azealia Banks.

17. Playboy's actions are in breach of the express or implied license agreement between Playboy and Mediatakeout.

18. Mediatakeout has suffered damages as a direct result of the breach of the express or implied agreement by Playboy in an amount to be determined at trial.

SECOND COUNTERCLAIM
(Unfair Competition)

19. Mediatakeout realleges and incorporates by reference the allegations in paragraphs 1 through 18 above.

20. Playboy has been and is engaging in unfair competition with Mediatakeout by seeking to and actually interfering with Mediatakeout's right to publish and comment on matters of public interest, including celebrity artists and performers such as Azealia Banks.

21. Playboy's activities constitute unfair competition under the common law of the State of New York.

22. Playboy's activities have damaged and will continue to damage Mediatakeout's goodwill and reputation and to interfere with its lawful activities.

23. As a result, there is a likelihood of irreparable injury to Mediatakeout, its reputation, and its ability to exercise its rights.

24. Mediatakeout has no adequate remedy at law.

25. Mediatakeout is entitled to an injunction restraining Playboy from engaging in any further acts in violation of Mediatakeout's rights.

26. The acts and omissions of Playboy were knowing and willful.

27. As a direct result of Playboy's unlawful acts, Mediatakeout has suffered damages and is entitled to punitive damages in an amount to be determined at trial.

DEMAND FOR JURY TRIAL

Defendant demands trial by jury of all issues so triable.

WHEREFORE, Defendant prays that the Court enter judgment dismissing plaintiff's claims and the action with prejudice, enter judgment on Defendant's counterclaims awarding damages and injunctive relief, as appropriate, awarding Defendant its full costs, including reasonable attorney's fees as prevailing party under 17 U.S.C. § 505 and § 1203(b)(4) and (5), and granting such other and further relief as the Court deems fair and equitable.

Dated: New York, New York
March 11, 2016

Respectfully submitted,

DANIEL LAW PLLC

By: /s/ Al J. Daniel, Jr.
Al J. Daniel, Jr.
305 Broadway, 7th Floor
New York, NY 10007
(212) 721-0902
ajd@daniellawpllc.com

Notoya Green
Mediatakeout.com LLC
130 Church Street, Suite 267
New York, NY 10007
(347) 743-9639
notoya.green@mediatakeout.com

Attorneys for Defendant